United States District Court
For the Northern District of California

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5   UNITED STATES DISTRICT COURT

6   NORTHERN DISTRICT OF CALIFORNIA

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8 TK POWER, INC.,   No. C-04-5098 EMC

9   Plaintiff,

10   v.   **ORDER DENYING DEFENDANT'S**
                                                     MOTION TO DISMISS BASED ON
11 TEXTRON, INC.,   **NEWLY-DISCOVERED SPOLIATION**
                                                     OF EVIDENCE
12   Defendant.
     _____/   **(Docket Nos. 170, 197)**
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15   The parties have filed briefs and supporting materials and presented argument in support of

16 and in opposition to Defendant's motion. The Court ordered an evidentiary hearing which was held

17 on May 10, 2006. Witnesses Robert Taylor and Gary Fleer testified and were subject to cross-

18 examination by counsel for Defendant as well as examination by the Court. Having considered all

19 the papers, argument of counsel and the testimony of the witnesses whose credibility the Court has

20 observed and assessed, the Court concludes there was no spoliation of evidence.

21   The Court makes the following factual findings:

22   1.   Charger #1462 sent to Textron by TK Power for Textron's testing in 2006 (as ordered

23   by the Court) was not uploaded with the software sent to Fleer from

24   Stojanovic/Taylor on January 5, 2006.

25   2.   Charger #1462 had the same software that resided in it since 2003. Fleer loaded the

26   November, 2003 version of the software onto chargers #1461 and #1462 after #1462

27   was returned from Textron following testing of #1462 by Dr. Wells. Importantly,

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1   that November 2003 software had been sent to Carlton Hearn of Textron on

2   November 3, 2003.

3   3.   There is nothing to indicate that any chargers have been loaded with some version of

4   software formulated after the last version was sent to Textron in November, 2003.

5   There is no evidence, therefore, that any charger was tampered with or altered by TK

6   Power in a way that would give TK Power an unfair or secret advantage in the testing

7   process for purposes of this litigation.

8   Defendant's motion is **DENIED**. This order disposes of Docket Nos. 170 and 197.

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10   IT IS SO ORDERED.

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12 Dated: May 11, 2006

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14 EDWARD M. CHEN
United States Magistrate Judge

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